(4)

Supreme Court, U.S.
FILED
AUG 6 - 2009
OFFICE OF THE CLERK

No. 08-1319

IN THE

Supreme Court of the United States

RONNIE ADCOCK *et al.*,
Petitioners,

v.

FREIGHTLINER LLC *et al.*,
Respondents.

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

WILLIAM L. MESSENGER
Counsel of Record
NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.
8001 Braddock Road, Suite 600
Springfield, VA 22160
(703) 321-8510

Counsel for Petitioners

August 6, 2009

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. Respondents Do Not Dispute The Importance of This Case	1
II. The Petition Should Be Granted Because Exempting Organizing Assistance From § 302 Allows Unions to Subvert The Organizing and Collective Bargaining Procedures of the National Labor Relations Act	2
A. Section 302 Must Be Enforced as Written to Prevent Unions From Supplanting the NLRA's Organizing Procedures	3
B. Section 302 Must be Enforced as Written to Prevent Corruption of the NLRA's Collective Bargaining Process	4
C. That Respondents' Conduct Violates the NLRA Does Not Justify Not Enforcing § 302 as Written	6
III. Respondents Have Not Rebutted The Existence of a Circuit Split Regarding the Proper Interpretation of "Thing of Value"	8
CONCLUSION	12

TABLE OF AUTHORITIES

CASES	Page
Arroyo v. United States, 359 U.S. 419 (1959)	6, 11
Chamber of Commerce v. Brown, 128 S. Ct. 2408 (2008)	3
Connecticut National Bank v. Germain, 503 U.S. 249 (1992)	7
Dana Corp., 351 N.L.R.B. 434 (2007)	3
Ford Motor Co. v. Huffman, 345 U.S. 330 (1953)	4
Hospital Employees' Division of Local 79, SEIU v. Mercy-Memorial Hospital Corp., 862 F.2d 606 (6th Cir. 1988), *judgment vacated on other grounds*, 492 U.S. 914, *on remand*, 881 F.2d 1076 (6th Cir. 1989)	7
International Longshoremen & Warehousemen's Union v. Juneau Spruce Corp, 342 U.S. 237 (1952)	7
Lechmere v. NLRB, 502 U.S. 527 (1992)	3
Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991)	11
Local 144, Nursing Home Pension Fund v. Demisay, 508 U.S. 581 (1993)	11
Majestic Weaving Co., 147 N.L.R.B. 859 (1964), *enforcement denied on other grounds*, 355 F.2d 854 (2d Cir. 1966)	5
NLRB v. BASF Wyandotte, 798 F.2d 849 (5th Cir. 1986)	8, 9

TABLE OF AUTHORITIES—Continued

	Page
NLRB v. Gissel Packing Co., 395 U.S. 575 (1969)	3
NLRB v. Lion Oil Co., 352 U.S. 282 (1957)	2, 6
Thomas Built Buses (Int'l Union, UAW), Case No. 11-CA-20038 (NLRB Div. of Advice Memo. 2004)	6
United States v. Batchelder, 442 U.S. 114 (1979)	7
United States v. Collins, 56 F.3d 1416 (D.C. Cir. 1995)	10
United States v. Croft, 750 F.2d 1354 (7th 1984)	9
United States v. Freeman, 208 F.3d 332 (1st Cir. 2000)	10
United States v. Girard, 601 F.2d 69 (2d Cir. 1979)	9
United States v. Jeter, 775 F.2d 670 (6th 1985)	9
United States v. Marmolejo, 89 F.3d 1185 (1996)	10
United States v. May, 625 F.2d 186 (8th Cir. 1980)	9
United States v. Ryan, 350 U.S. 299 (1956)	11
United States v. Schiffman, 552 F.2d 1124 (5th Cir. 1977)	8, 9

TABLE OF AUTHORITIES—Continued

	Page
United States v. Williams, 705 F.2d 603 (2d Cir. 1983)	10
Vaca v. Sipes, 386 U.S. 171 (1967)	7
STATUTES	
7 U.S.C.A. § 2008s(a)(3)(D)	11
18 U.S.C. § 641	9
18 U.S.C. § 666	10
16 U.S.C.A. § 2114(c)	11
29 U.S.C. § 158	*passim*
29 U.S.C. § 159	3, 4
29 U.S.C. § 186	*passim*
29 U.S.C. § 187	7
29 U.S.C.A. § 772(a)(1)	11
38 U.S.C.A. § 4215(c)	11
LEGISLATIVE HISTORY	
92 Cong. 4891 (Sen. Byrd)	5
S. Rep. No. 86-187 (1959), *reprinted* 1959 U.S.C.C.A.N. 2318	4

IN THE

Supreme Court of the United States

No. 08-1319

RONNIE ADCOCK *et al.*,
Petitioners,

v.

FREIGHTLINER LLC *et al.*,
Respondents.

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

I. Respondents Do Not Dispute The Importance of This Case

Respondents UAW and Freightliner do not contest that this petition presents an issue of exceptional importance: whether section 302 of the Labor Management Relations Act, 29 U.S.C. § 186, prohibits unions from demanding and receiving valuable assistance from employers in organizing. (Pet. 9-24).

Specifically, Respondents tacitly recognize that unions increasingly are: seeking organizing assistance from employers, (Pet. 12-15); pressuring and extorting resistant employers for organizing assistance

through "corporate campaigns," (Pet. 23-24); and, compromising employee interests during collective bargaining in exchange for organizing assistance, (Pet. 21-23). These facts were also made clear by amici National Federation of Independent Business and Society for Human Resource Management. (Amicus Br. 4-7).

The importance of this case to employees, employers, and unions is incontrovertible. Indeed, this case presents the most important question in labor law today. Whether unions can demand organizing assistance from employers as a price for labor peace and submissiveness at the bargaining table has the greatest significance to a national labor policy that favors employee free choice and disfavors company unions. Consequently, the writ should issue. *See NLRB v. Lion Oil Co.*, 352 U.S. 282, 285 (1957) (granting certiorari because trend amongst unions to enter into certain agreements made case of great importance).

II. The Petition Should Be Granted Because Exempting Organizing Assistance From § 302 Allows Unions to Subvert The Organizing and Collective Bargaining Procedures of the National Labor Relations Act

Respondents argue that enforcing § 302 in this case will undermine the National Labor Relation Act's organizing and collective bargaining procedures. (Opp. Br. 13-16). This is the height of effrontery. The very purpose of Respondents' scheme is to *supplant* the NLRA's procedures with a private agreement. (Pet. 12-13). And the purpose of 302 is to protect the integrity of the NLRA's collective bargaining and organizing procedures from private sweetheart deals between unions and employers. It is imperative that the Court take this case to prevent unions from

upending the NLRA through private organizing agreements.

A. Section 302 Must Be Enforced as Written to Prevent Unions From Supplanting the NLRA's Organizing Procedures

"By its plain terms . . . the NLRA confers rights only on employees, not on unions or their nonemployee organizers." *See Lechmere v. NLRB*, 502 U.S. 527, 532 (1992). To effectuate employee free choice during organizing campaigns, the NLRA provides for secret-ballot elections conducted under § 9(a) of the Act, 29 U.S.C. § 159(a),[1] and an "uninhibited, robust, and wide-open debate" about unionization between employer and union under § 8(c) of the Act, 29 U.S.C. § 158(c), *Chamber of Commerce v. Brown*, 128 S. Ct. 2408, 2413-14 (2008) (quotation omitted). The NLRA does not grant unions a right to assistance from employers with organizing their employees. *See Lechmere,* 502 U.S. at 532-34.

Union organizing agreements turn the NLRA's organizing process on its head. They eliminate the NLRA's protections of employee free choice by banning secret-ballot elections and gagging employer speech about unionization. *See, e.g.,* Card Check Agreement, ¶¶ 4, 9 (Pet. App. 39a, 41a). These employee protections are replaced with employer assistance to the union. The NLRA's "bottom-up" organizing process is upended into a "top-down" process. (*See* Pet. 12-13).

---

[1] 29 U.S.C. § 159(a); *see NLRB v. Gissel Packing Co.*, 395 U.S. 575, 602 (1969); *Dana Corp.*, 351 N.L.R.B. 434, 438-40 (2007).

Congress prohibited top-down organizing when it amended § 302 to apply to organizing activities. Section 302 originally prohibited only employer delivery of money or things to current union "representatives." In 1959, the prohibition was extended to: (1) "any labor organization" that "*seeks to represent*, or would admit to membership, any of the employees of such employer," 29 U.S.C. § 186(a)(2) (emphasis added); and, (2) "any employee or group or committee of employees . . . for the purpose of causing such employee or group or committee . . . to influence any other employees in the exercise of the *right to organize* and bargaining collectively through representative of their own choosing." 29 U.S.C. § 186(a)(3) (emphasis added). *See* S. Rep. No. 86-187 (1959), *reprinted* 1959 U.S.C.C.A.N. 2318, 2330.

Thus, in unmistakable terms, Congress prohibited unions from demanding things of value from employers of employees they seek to organize. Nevertheless, unions are aggressively seeking organizing assistance from employers to circumvent the NLRA's organizing process. (Pet. 12-15). It is imperative that the Court determine the legality under § 302 of this top down organizing model.

B. Section 302 Must be Enforced as Written to Prevent Corruption of the NLRA's Collective Bargaining Process

The collective bargaining process the NLRA establishes involves a union dealing with an employer strictly as a fiduciary representative of *employees* with respect to the wages, benefits, and other things the employer provides to its *employees* for their services. *See* 29 U.S.C. §§ 159(a) & 158(d); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337-38 (1953). It does *not* involve a union dealing with an employer for

itself. Such self-dealing is inimical to legitimate bargaining and strictly prohibited by § 302. (Pet. Br., 20-22).[2]

Organizing agreements upend the collective bargaining process. Unions deal for themselves when negotiating organizing agreements, not for employees they exclusively represent.[3] Organizing agreements require employer delivery of valuable things directly to unions, not to employees for their services.

Worse, unions compromise employee interests in collective bargaining in exchange for organizing assistance. (Pet. 21-23). Here, as quid pro quo for organizing assistance from Freightliner, the UAW secretly agreed to wage, benefit, transfer rights, severance, overtime, strike, subcontracting, job qualification, and overtime concessions in the Preconditions Agreement (App. 43a-44a), and a wage freeze and increase in benefits costs at a facility in Mt. Holly, North Carolina.

Section 302 exists to protect the integrity of the NLRA's collective bargaining process from union self-

---

[2] Legitimate collective bargaining does not violate § 302 because nothing is delivered to the union itself under § 302(a) that is not permitted by § 302(c). Section 302(a) "does not prohibit the employee himself from accepting money or other things of value if it is directly paid to the employee by the employer." 92 Cong. 4891 (Sen. Byrd). Section 302(c) exempts those few legitimate employee benefits that also result in the delivery of something to their union representative. The contract terms cited on pages 14-15 of Respondents brief are lawful for these reasons.

[3] By definition, organizing agreements are negotiated *before* the union is the representative of the employees it seeks to organize. This is generally unlawful under the NLRA. *See Majestic Weaving Co.*, 147 N.L.R.B. 859 (1964), *enforcement denied on other grounds*, 355 F.2d 854 (2d Cir. 1966).

dealing.[4] The statute strictly prohibits union receipt of any "thing of value" from employers to ensure that unions *only* deal with employers as employee representatives. This, in turn, ensures that unions cannot be induced to sacrifice employee interests to satiate union self-interests. (Pet. 10-12, 20-23).

Widespread union self-dealing for organizing assistance is incompatible with the collective bargaining process Congress envisioned in the NLRA and § 302. At the very least, it represents a drastic change in a process formerly predicated on unions acting solely as employee representatives. It is imperative that this Court determine whether this rampant union practice is lawful under § 302. *Cf. Lion Oil*, 352 U.S. at 285.

C. That Respondents' Conduct Violates the NLRA Does Not Justify Not Enforcing § 302 as Written

Respondents claim that it is relevant that the NLRA provides remedies for Respondents' conduct. (Opp. Br. 15-16). Although it is true that Respondents' conduct violates § 8 of the NLRA,[5] this is no reason for not enforcing § 302 as written.

"[S]o long as there is no 'positive repugnancy' between two laws, a court must give effect to both."

---

[4] *See Arroyo v. United States*, 359 U.S. 419, 425 (1959) (Section 302 was "enacted as part of a comprehensive revision of federal labor policy in the light of experience acquired during the years following passage of the . . . [NLRA] and was aimed at practices which Congress considered inimical to the integrity of the collective bargaining process"); (Pet. 10-12).

[5] *See Thomas Built Buses (Int'l Union, UAW)*, Case No. 11-CA-20038 (NLRB Div. of Advice Memo. 2004) (Pet. App. 20a, 27a-28a)

Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 254 (1992) (quotation omitted). The mere fact that two statutory prohibitions apply to the same conduct does not justify not enforcing one of them. *See United States v. Batchelder*, 442 U.S. 114, 122 (1979).

"Both § 302 of LMRA and § 8 of the NLRA may make similar conduct unlawful, but each provides an independent remedy." *Hospital Employees' Div. of Local 79, SEIU v. Mercy-Memorial Hosp. Corp.*, 862 F.2d 606, 608 (6th Cir. 1988).[6] Therefore, § 302 can be enforced against conduct subject to § 8 of the NLRA. *Id.* at 608. Indeed, a contrary conclusion "would effectively repeal § 302 because the conduct proscribed by § 302 is almost always arguably subject to §§ 7 or 8 of the NLRA." *Id.*; *see also Int'l Longshoremen & Warehousemen's Union v. Juneau Spruce Corp*, 342 U.S. 237, 244 (1952) (remedies of § 303 of the LMRA, 29 U.S.C. § 187, are independent of the NLRA).

That the UAW's conduct violates § 8 of the NLRA does not excuse the Fourth Circuit's decision not to enforce § 302 as written. "[S]ection 302 is an independent liability-creating statute enacted by Congress to provide additional judicial remedies for certain wrongful conduct." *Mercy-Memorial Hosp.*, 862 F.2d at 608. Denial of those additional remedies because the NLRB General Counsel might not exercise his discretion to prosecute violations of § 8 would undermine the regime Congress established to protect employees from self-dealing by their union representatives. *Cf. Vaca v. Sipes*, 386 U.S. 171, 182-83 (1967).

---

[6] *Further proceedings*, 492 U.S. 914 (*cert. granted & judgment vacated on other grounds*), *on remand*, 881 F.2d 1076 (6th Cir. 1989) (table) (reinstating § 302 ruling).

III. Respondents Have Not Rebutted The Existence of a Circuit Split Regarding The Proper Interpretation of "Thing of Value"

Employer assistance with organizing employees—specifically company-paid captive audience meetings for the union, use of private property for organizing, and gag clauses on speech against unionization—are plainly "thing[s] of value . . . to any labor organization." 29 U.S.C. § 186(a)(2). (Pet. 15-18). The UAW and other unions aggressively seek this assistance, give valuable consideration to obtain it, and use it to organize new dues-paying employees into union ranks. (*Id.*). There is nothing unions value more from employers whose employees they seek to unionize.

Respondents do not deny the value of organizing assistance to unions, but argue that "thing of value" in § 302 is limited to things with monetary value. (Opp. Br. 10-12). But, even if true—which it is not—that would not justify the Fourth Circuit's decision or diminish the conflict among circuits.

1. Foremost, organizing assistance has great monetary "value" to the UAW and other unions. It is obviously not worthless. In fact, unions and other organizations commonly pay for use of property, services of personnel, and communications. This was established in the petition, (Pet. 16-17), and never rebutted by Respondents.

Indeed, Respondents admit that union use of property was found to have monetary value in two § 302 cases decided by the Fifth Circuit. (*See* Opp. Br. 8-9) (discussing *NLRB v. BASF Wyandotte*, 798 F.2d 849, 858 (5th Cir. 1986) (Jolly J,. concurring); *United States v. Schiffman*, 552 F.2d 1124, 1126 (5th Cir.

1977)). Use of a company office in *BASF Wyandotte* and of discounted hotel rooms in *Schiffman* had monetary value because they saved the unions money. Similarly, Freightliner giving the UAW free use of its facilities and paid work time of its personnel for organizing has monetary value because it reduced the UAW's organizing expenses. Thus, the Fourth Circuit's decision directly conflicts with the Fifth Circuit's decisions in those two cases.[7]

2. Respondents' argument does not diminish the conflict among circuits as to the meaning of the term "thing of value." The First, Second, Fifth, Sixth, Seventh, Eight, and D.C. Circuits all broadly construe this term of art in statutes that expressly require monetary value.

"Thing of value" in 18 U.S.C. § 641 is interpreted to encompass intangibles, use of property, services of personnel, and information, even though the statute requires a "face, par, or market value, or cost price."[8]

---

[7] Contrary to Respondents' claim, the Fifth Circuit did hold that use of company property was a "thing of value" when finding that union use of a company office satisfied the exemption stated at § 302(c)(1) in *BASF Wyandotte*, 798 F.2d at 856. By its terms, § 302(c)(1) applies *only* to any "money or other thing of value" that meets certain conditions. 29 U.S.C. § 186(c)(1). Moreover, the court would not have considered if this exemption applied without first concluding that use of company property is a "thing of value" § 302(a) otherwise prohibits. That the Fifth Circuit did not devote much discussion to this conclusion simply reflects its obvious nature.

[8] *See United States v. Girard*, 601 F.2d 69, 71 (2d Cir. 1979) (intangibles and information); *United States v. Jeter*, 775 F.2d 670, 680 (6th 1985) (intangibles, services of personnel, and information); *United States v. Croft*, 750 F.2d 1354, 1361-62 (7th 1984) (services of personnel); *United States v. May*, 625 F.2d 186, 191-92 (8th Cir. 1980) (use of property and services of per-

Similarly, "anything of value" in 18 U.S.C. § 666(a)(1)(B) requires a minimum monetary value, but is "broad in scope and contains no language restricting its application to transactions involving money, goods, or services." *United States v. Marmolejo*, 89 F.3d 1185, 1191 (5th Cir. 1996) (prison conjugal visits); *see also United States v. Freeman*, 208 F.3d 332, 341 (1st Cir. 2000) (use of nightclub property is "anything of value" under § 666).

The scope of "thing of value" is interpreted as broadly in statutes that require monetary value as in those that do not.[9] So irrespective of whether monetary value is required under § 302, the reality remains that the Fourth and Third Circuits have interpreted this statutory term differently and far more narrowly than the First, Second, Fifth, Sixth, Seventh, Eight, and D.C. Circuits. (Pet. 29-31).

3. Nothing in § 302 restricts "thing of value" to monetary worth in any event. The word "deliver" does not connote monetary value. That § 302(d) provides for additional criminal penalties if the value of the money or thing exceeds $1,000 does not change the fact *no monetary value* is required to establish a misdemeanor violation under § 302(d) or civil violation under § 302(e). 29 U.S.C. §§ 186(d)-(e).

Nor does "deliver" limit § 302 to tangible items. One can "deliver" services within the plain usage of

---

sonnel); *United States v. Collins*, 56 F.3d 1416, 1419 (D.C. Cir. 1995) (intangibles and information).

[9] This is only logical, as how value is measured does not effect what *types* of things are a "thing of value." For example, worthless shares of stock lack monetary value, but are within the ambit of "thing of value." *See United States v. Williams*, 705 F.2d 603, 623 (2d Cir. 1983).

the term, including those at issue here. *Cf. Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 556 (1991) (Scalia, concurring) ("Where the state imposes upon the union a duty to *deliver services*, it may . . .") (emphasis added). In fact, the exact phrase "deliver services" appears in multiple statutes.[10]

Limiting § 302 to monetary worth makes no sense in light of the statute's purpose. Section 302 does not exist to prevent unions from acquiring wealth. It exists to prevent unions from compromising the interests of employees they exclusively represent in exchange for things from their employer. (Pet. 10-12). As the UAW's conduct makes clear, unions will sacrifice employee interests as a quid pro quo for valuable services that facilitate organizing. (Pet. App. 42a-43a).

4. "Thing of value" is used as broadly in § 302 as in every other statute, indeed as broadly as the man in the street would understand it. This Court has repeatedly recognized that § 302's "prohibitions . . . are drawn broadly." *Local 144, Nursing Home Pension Fund v. Demisay*, 508 U.S. 581, 585 (1993).[11] Congress intended § 302 as a prophylactic ban on employers giving *anything* of value to unions except as expressly permitted in § 302(c). (Pet. 10 n. 2 (quoting legislative history)).

It is beyond peradventure that employer services that assist union organizing are "thing[s] of value . . . to any labor organization." 29 U.S.C. § 186(a)(2). The

---

[10] *See, e.g.*, 7 U.S.C. § 2008s(a)(3)(D); 16 U.S.C. § 2114(c); 29 U.S.C. § 772(a)(1); 38 U.S.C. § 4215(c).

[11] *Accord United States v. Ryan*, 350 U.S. 299, 305 (1956) (§ 302 a "broad prohibition"); *Arroyo v. United States*, 359 U.S. 419, 424 (1959) (same).

Fourth Circuit's decision to carve an unwritten organizing exemption into § 302 must be reviewed by this Court because it does exceptional violence to both the language and purpose of the statute and conflicts with this Court's prior understanding of that statute.

CONCLUSION

The Petition for a Writ of Certiorari should be granted to settle the important question of national labor policy this case presents.

Respectfully submitted,

WILLIAM L. MESSENGER
Counsel of Record
NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.
8001 Braddock Road, Suite 600
Springfield, VA 22160
(703) 321-8510

Counsel for Petitioners

August 6, 2009